TOH PECK HUAT

v.

SIVAKUMAR GOPAL

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA THAMBY CHIK J
[CIVIL APPEAL NO: R2-12-418-99]
8 MAY 2001

CIVIL PROCEDURE: *Appeal - Decision of trial judge - Whether judge had erred in judgment*

At the Sessions Court the appellant sued the respondent who was the registered owner of a motorcycle for the alleged involvement of the said motorcycle in an accident with the appellant. Although the learned judge found that the respondent's motorcycle was involved in the said accident with the appellant, it dismissed the appellant's claim on the ground that the appellant failed to prove the identity of the respondent. The appellant appealed against this decision.

Held:

[1] Having concluded that the respondent's motorcycle was involved in the accident and in the absence of any rebuttal evidence from the respondent, the learned judge should have found in favour of the appellant. As the respondent's defence was a total denial of the involvement of his motorcycle in the accident, the learned judge had erred in law and fact when he failed to find in favour of the appellant since in coming to such a conclusion, the respondent's defence must necessarily fail. (p 569 d-e)

[Appeal allowed.]

Case(s) referred to:
Dato' Abdullah Hisham Hj Mohd Hashim v. Sharma Kumari Shukla (No 3) [1999] 7 CLJ 464 ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 511 ***(refd)***
Johannes Koplan v. Aw Chen [1970] 1 MLJ 220 ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 ***(refd)***
Mohd Salleh Kasim v. Taisho Marine & Fire Insurance Co Ltd & Anor [1999] 5 CLJ 302 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 29
Road Transport Act 1987, s. 96(2), (3)

For the plaintiff - K Ganesan; M/s Abdul Rahim & Co
For the defendant - Noor Fauziah Kadir; M/s SN Fam & Co

Reported by Suresh Nathan

JUDGMENT

Faiza Thamby Chik J:

In short, this appeal is on the issue of liability only. This accident involves SP3 who was riding a motorcycle WGD 3726 and motorcycle WDH 2144 ridden by the respondent or his servant or agent or person riding with the respondent's consent as appears in p. 16 of the Appeal Record. The respondent's defence herein is total denial of involvement of his motorcycle WDH 2133 in the said accident. At the trial before the Sessions Court the respondent failed to testify. After the conclusion of the trial the trial judge made a finding of fact that motorcycle WDH 2133 was indeed involved in the alleged accident involving the appellant (at p. 40 of the Appeal Record).

It is observed that the trial judge after arriving at a conclusion that the respondent's motorcycle WDH 2144 was indeed involved in the accident and in the absence of any rebuttal evidence from the respondent, should have found in favour of the appellant instead and thereby had erred in law and fact in dismissing the appellant's claim with cost. Since the respondent's defence was a total denial of involvement of his motorcycle in the accident the learned trial judge erred in law and fact when he failed to find in favour of the appellant since in coming to such a conclusion, the respondent's defence must fail. The respondent's defence herein is total denial of involvement of his motorcycle in this accident and that such knowledge is within the personal knowledge of the respondent and such a defence indicated that the appellant's claim will be resisted to the hilt and yet the respondent chose not to testify. In the case of *Dato' Abdullah Hisham Hj Mohd Hashim v. Sharma Kumari Shukla (No 3)* [1999] 6 MLJ 589 RK Nathan J at p. 590 has ruled as follows:

> (2) Having given every indication that the claim would be resisted to the hilt, and having denied in the defence that she agreed to convert to Islam and marry the plaintiff in return for the promised loan, the defendant should have been the first witness for the defence. It was the bounden duty of the defendant, acquainted thoroughly with the facts of the case as she was, to testify on her own behalf and her failure to do so clearly discredited the truth of her case and established the truth of the plaintiff's case. While there is no rule of law that the defendant had to let herself be examined as a witness to establish her case, the court was perfectly justified in rejecting the averments in her defence unless there was other persuasive evidence in support of the case. Since all the material facts had been alleged against the defendant and the facts were personal to and within the personal knowledge of the defendant, and the defendant refused

to testify without any plausible reason, an adverse inference had to be drawn against her (see PP 597G-H, 598B-D).

Further the respondent did not testify at the trial or gave any reasonable reasons as to his absence on the date of trial. In this respect, I refer to the case of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 511 where the Supreme Court has ruled as follows:

> Once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

Notwithstanding the above, the main grounds for the learned trial judge to dismiss the appellant's claim was that the appellant failed to prove ownership and that the motorcycle was ridden by the respondent's servant or agent or person riding with the respondent's consent. There was no specific denial of ownership by the respondent in his statement of defence. Furthermore learned counsel for the respondent did not at all raise this issue in her cross examination of the appellant although the appellant knew the registration number of the motorcycle which collided into him yet the identity of the rider of the said motorcycle is not known as there was no police report lodged by the rider. In the light of the above, the appellant commenced an action against the registered owner ie, the respondent herein.

Pursuant to s. 29 of the Courts of Judicature Act 1964 from the Sessions Court is by way of re-hearing. In the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLJ 719 at p. 724 Gopal Sri Ram JCA said as follows:

> *Per curiam:*
>
> (1) (Per Gopal Sri Ram JCA) The categories of cases in which an appellate court will admit a new point not raised in the court below are not closed. The governing principle is that an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

It is observed that at the trial stage the respondent's counsel did not raise the issue of ownership of motorcycle WDH 2144 at all to give the appellant the opportunity to tender documentary evidence. In view of the above, the learned trial judge took into consideration issues which were not raised by the respondent in arriving at his decision and the learned trial judge should have found for the appellant after making a finding of fact that the motorcycle WDH 2144 was indeed involved in the alleged accident. Since the appellant had no such opportunity during the trial I grant leave to produce the R.I.M.V. report on motorcycle WDH 2144 (encl. "B") to confirm that the respondent was the

registered owner of motorcycle WDH 2144 at all material times. In the case of *Mohd Salleh Kasim v. Taisho Marine & Fire Insurance Co Ltd & Anor* [1999] 5 CLJ 302 where Abdul Malik Ishak J had said the following:

Held:

(1) The Registry of Vehicles in Singapore ("ROV") confirmed that on the date of the accident, the motorcycle was owned by the insured with the 1st defendant as the insurer. The court took judicial notice of the fact that the ROV, like the RIMV here, are efficient reliable keepers of the records of motor vehicles.

The respondent's counsel contended that the appellant failed to plead the particulars of the rider of motorcycle WDH 2144 in his pleadings. But the rider of the motorcycle WDH 2144 did not lodge any police report and there is no avenue for the appellant to obtain such particulars as to the identity of the said rider.

The appellant through his solicitors gave notice of commencement of action pursuant to s. 96(2) of the Road Transport Act 1987 (encl. "A" at p. 44). The insurers of the respondent's motorcycle retained the respondent's solicitors to defend the respondent herein. The insurers did not disclaim liability pursuant to s. 96(3) of the Road Transport Act 1987 which reads as follows:

No sum shall be a payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable.

By letter dated 10 February 1999 the insurers' of motorcycle WDH 2144 confirmed coverage of the said vehicle at the material time (encl. "B" at p. 45). Subsequently *vide* letter dated 12 March 1999 (encl. "C" at p. 46) the said insurers retained M/s. SN Pam & Co to take over the conduct of the matter. It is highly pertinent to note that this letter was copied to one Sivakumar Gopal ie, the respondent herein and that this was the very reason there was no dispute on ownership in the respondent's defence or by the respondent's counsel during cross examination or submission stage. It was within the knowledge of the respondent's counsel that the respondent was the registered owner of the motorcycle at all material times. In the light of above, the learned trial judge should have found for the appellant in this appeal and the respondent should have been held 100% liable to the appellant's claim once he made a finding of fact that the respondent's motorcycle was involved in the said collision with the appellant herein. To support the above argument, reference is made to the case of *Johannes Koplan v. Aw Chen* [1970] 1 MLJ at pp. 220 and 221 where the Federal Court made the following observations:

Per Curiam:

> In making the suggestion that we did, we might mention that we had in mind practical considerations. Legal technicalities which stand in the way of any aggrieved person seeking and obtaining his remedy in court should not be allowed to prevail so as to frustrate any just claim. Compulsory insurance against third party risks has made alterations in the common law whereby insurers are made directly liable to satisfy judgments against their insured. The negligent driver is only the nominal defendant, whereas the party injuriously affected by an award of damages is the insurer by and in whose interests the action should be defended. If insurers have to fight the action without their most essential witness, that would be their misfortune, and not the plaintiff's fault.

However, in this appeal the respondent's whereabout are known and I observe that there were no reasons given as to the non-attendance of the respondent on the trial date. In conclusion I am of the opinion that in the interest of justice, this is a proper case to warrant my interference against the decision of the learned trial judge in dismissing the appellant's action with costs and hence this appeal is allowed with costs.